FILED
DEC 11 1995

No. 95-511

In the Supreme Court of the United States

OCTOBER TERM, 1995

LISA B. WILLIAMS, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's "principal employment [was] in connection with an activity financed in whole or part by loans or grants made by the United States or a Federal agency" within the meaning of the Hatch Act, 5 U.S.C. 1501(4).

2. Whether the application to petitioner of the Hatch Act's prohibition on seeking partisan political office violates her constitutional rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 55 F.3d 917. The opinion of the district court (Pet. App. A32-A42) is unreported. The opinion of the Merit Systems Protection Board (Pet. App. A27-A31) is reported at 56 M.S.P.R. 277. The opinion of the administrative law judge (Pet. App. A13-A26) is unreported.

JURISDICTION

The judgment of the court of appeals was originally entered on May 3, 1995. The court's opinion was amended on June 9, 1995. A petition for rehearing was denied on June 29, 1995. Pet. App. A45-A46. The petition for a writ of certiorari was filed on September 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Hatch Political Activity Act (Hatch Act) prohibits any covered state government employee from being a candidate for elective office. 5 U.S.C. 1502(a)(3). A state employee is generally covered by the Act if the employee's "principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C. 1501(4). If the Merit Systems Protection Board (MSPB), which is responsible for enforcing the Act, determines that a state employee violated the Act in a manner that warrants dismissal, the government employer may either dismiss the employee and not rehire her for 18 months, or it may forgo an amount of otherwise available federal funds equal to two years' pay at the rate the employee was receiving at the time of the violation. 5 U.S.C. 1504-1506.

1. Between 1987 and 1994, petitioner was employed by the State of Maryland as Executive Assistant to the Director of the Governor's Office of Individuals with Disabilities (OID). Pet. App. A2-A3. The official "position description" for that job indicates that the Executive Assistant is to "assist the Director in the administration and management" of the Office. *Id.* at A8, A20-A21. OID administers several subsidiary

programs, including two that are federally funded: the Technology Assistance Program (TAP) and the Developmental Disabilities Counsel (DDC). Pet. App. A17. Both TAP and DDC are "under personnel and managerial control of OID," and OID is "directly responsible for [the] proper administration of federal grant awards" to the two programs. *Ibid.*; see *id.* at A22-A23.

While petitioner was employed at OID, DDC's time sheets, bills, federal invoices, and other financial matters were channelled through OID, where they were consolidated and approved by the Director before being forwarded to the state Financial Administration Office for payment. Pet. App. A3, A17. OID was also responsible, under federal law, for approving DDC's financial status reports. *Id.* at A17. Petitioner was authorized, in the Director's absence, to sign those reports, as well as invoices, grant payment request forms, and time and attendance reports, in each case certifying or approving the expenditure of federal funds. *Id.* at A3, A23. She did so on several occasions. *Ibid.*

In 1990, petitioner entered a primary election seeking the Democratic Party's nomination for a seat in the Maryland House of Delegates. Pet. App. A3, A16. The United States Office of Special Counsel (OSC), which commences administrative enforcement actions before the MSPB under the Hatch Act, see 5 U.S.C. 1504, sent petitioner three letters informing her that she was subject to the Hatch Act, that her candidacy violated the Act, and that the violation could result in her dismissal from employment. Pet. App. A3. Disagreeing with OSC's interpretation of the Act, petitioner continued her election effort, which was ultimately unsuccessful. *Ibid.*

In 1992, OSC charged petitioner with violating the Hatch Act. Pet. App. A3. An administrative law judge (ALJ) of the MSPB held that petitioner was subject to the Act's prohibitions, in part because her job description "demonstrate[d] that she simply could not perform her duties as Executive Assistant without in some way coming into direct contact with federally-funded activities." *Id.* at A22. The ALJ also relied on the fact that petitioner assisted the Director (and acted in the Director's absence) in exercising "administrative direction and control" over two federally funded programs, including signing financial reports and authorizations for the payment of federal funds. *Id.* at A22-A23.

The ALJ accordingly determined that "as a normal and foreseeable incident to her principal job [petitioner] perform[ed] duties in connection with federally-financed activities" (Pet. App. A23), and that those duties were more than "merely casual or accidental" (*id.* at A24). Because petitioner's violation of the Hatch Act was "serious, conspicuous and at odds with written warnings given by the very agency which oversees" the Act, the ALJ concluded that it was "of such scope and effect as to warrant removal" from employment. *Id.* at A25-A26. The MSPB adopted the ALJ's decision, found that her removal from her position would be warranted under 5 U.S.C. 1505, and ordered either that petitioner be removed from her position, or that OID forfeit receipt of federal funds in an amount equal to two years of her pay. Pet. App. A27-A31 & n.5.

2. The district court reversed the MSPB's decision. Pet. App. A32-A44. The court rejected the MSPB's interpretation of the Act's coverage in this case as overbroad. *Id.* at A35-A38. The court con-

strued the statute (and the MSPB's prior cases) "to include as 'covered employees' [only] those whose duties have a connection with the use of federal funds by virtue of the employee's discretionary or supervisory authority and not by virtue of nondiscretionary ministerial actions or duties." *Id.* at A39. Applying that interpretation, the court concluded that petitioner "neither had no[r] exercised any discretionary or supervisory authority in connection with the use of federal funds." *Id.* at A40. Moreover, the court held that, even if it could find that petitioner had possessed some discretionary authority with respect to the invoices and other financial documents she signed, the exercise of such discretion "was not a normal and foreseeable incident of her job as required by" previous MSPB cases. *Id.* at A40-A41. Rather, the "*de minimis* nature and irregularity" of petitioner's responsibilities with respect to federal funds was "not sufficient to warrant the conclusion that [petitioner] was a 'covered employee' under the Act." *Id.* at A41.

3. The court of appeals reversed, reinstating the MSPB's decision. Pet. App. A1-A12. The court accepted the MSPB's general interpretation that a state employee "is subject to the Hatch Act if, as a normal and foreseeable incident to [her] principal position or job, [she] performs duties in connection with an activity financed in whole or in part by federal funds" (*id.* at A5, quoting *Special Counsel* v. *Gallagher*, 44 M.S.P.R. 57, 61 (1990)), so long as the employee's connection with federally funded activities is not " 'merely a casual or accidental occurrence' of employment" (Pet. App. A5, quoting *In re Brown*, 3 Political Action Rep. 273, 300 (Civil Serv. Comm'n 1974)). The court concluded that "[t]he district court

went beyond the plain language of the Act, and the decisions interpreting that language, when it determined that the actual exercise of supervisory or discretionary control over federally-funded activity was the requisite connection necessary for [petitioner] to be subject to the Act." Pet. App. A7.

The court of appeals emphasized that the district court's "narrow interpretation of the scope of the Hatch Act has not been expressed in any published decision nor has it been adopted by the MSPB, the agency charged with enforcement of the Act." Pet. App. A7. With regard to the district court's reliance on prior cases that had involved more direct supervisory responsibility over federally funded activities, the court pointed out that "Hatch Act cases are fact specific[,] and the mere fact that several state employees found in violation of the Act also held or exercised such discretionary authority does not indicate that the exercise of discretionary authority is a necessary requirement to being covered under the Act." *Id.* at A7-A8.

Applying its interpretation of the Act, the court agreed with the MSPB that petitioner was employed "in connection with" federally funded activities. Pet. App. A8. The court noted that there was "no dispute that OID administered federal funds through its oversight of DDC," and it held that petitioner's "duties in connection with the federally-funded activities of the DDC were normal and foreseeable incidents to her job as Executive Assistant to the Director of OID." *Ibid.* In particular, "it was foreseeable that [petitioner's] normal job duties included authorizing DDC expenditures in the Director's absence." *Ibid.* Thus, although "most of [petitioner's] duties at OID were apart from federally-

funded activities," the court held that petitioner's periodic personal approval of "numerous DDC invoices, expense accounts, and grant payment requests" was sufficient to support the MSPB's conclusion that petitioner was subject to the Hatch Act. *Id.* at A8-A9.

The court of appeals rejected petitioner's argument that application of the Hatch Act to her partisan political candidacy violated her rights under the First Amendment. Pet. App. A9 n.7. Relying on its prior decision vacating a stay entered by the district court to prevent petitioner's removal from office pending appeal, the court noted that "[t]he Supreme Court has consistently found that the Hatch Act is constitutional and does not violate the First Amendment." *Ibid.* (quoting *Williams* v. *MSPB*, 15 F.3d 46 (4th Cir. 1994), and citing *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), and *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973)).

Finally, the court of appeals affirmed the MSPB's determination that removal from employment was an appropriate sanction for petitioner's Hatch Act violation. Pet. App. A9-A12. The court noted that "Congress has determined that the only penalty for violation of § 1502 of the Hatch Act is removal" (or a prescribed forfeiture of federal funds by the state employer), but that the MSPB has the discretion to determine whether to impose removal, or no penalty at all. *Id.* at A10. After reviewing the MSPB's conclusions that petitioner's partisan candidacy was a serious violation of the Act, knowingly undertaken in the face of repeated warnings that it would contravene the Act's prohibitions, the court concluded that the MSPB's decision to order petitioner's

removal was "in accordance with law, and [that] the [MSPB] did not abuse its discretion in reaching that decision based on a careful weighing of the mitigating and aggravating factors" involved in petitioner's case. *Id.* at A11-A12. The court accordingly remanded the case to the district court for the entry of an order affirming the MSPB's decision in all respects. *Id.* at A12.

ARGUMENT

The court of appeals correctly upheld the MSPB's reasonable construction of the Hatch Act, which does not conflict with any decision of this Court or of any court of appeals. There is no reason for this Court to review either that decision or the MSPB's application of the Act to the specific facts of petitioner's case.

1. The Hatch Act restricts the partisan political activities of any "individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C. 1501(4); see 5 U.S.C. 1502-1503. Congress has entrusted the enforcement of those restrictions to the MSPB. 5 U.S.C. 1504-1505. As the court of appeals recognized (Pet. App. A5-A6), the MSPB has interpreted the Act to apply to any state employee who, "as a normal and foreseeable incident to [the employee's] principal position or job," performs duties "in connection with" any federally financed activity. *Special Counsel* v. *Gallagher*, 44 M.S.P.R. 57, 61 (1990). That interpretation is reasonable and consistent with the plain language of the Act, and the court of appeals properly sustained it.

Petitioner argues (Pet. 5-8) that the MSPB's interpretation of the Act is overbroad, evidently because the MSPB made no finding that her partisan activities "had an adverse effect on the proper administration of [federal] funds" (Pet. 6). The Act's proscriptions, however, are broad and prophylactic: nothing in the Act requires any showing of an actual adverse effect in a particular case. See 5 U.S.C. 1502(a). Moreover, as the court of appeals recognized (Pet. App. A7), nothing in the Act (or in the cases applying it) supports the district court's proposed limitation of coverage to state employees whose jobs require them to exercise "discretionary or supervisory authority" over federally funded activities (*id.* at A39). Indeed, the similar prohibition on partisan political campaigns by most federal government employees applies regardless of whether a particular employee's job involves the exercise of any discretion. 5 U.S.C. 7323(a)(3); see *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100-101 (1947). There is no indication that Congress intended to impose a different standard on state officials employed "in connection with" federally funded activities. 5 U.S.C. 1501(4).

The "in connection with" standard itself imposes some limitation on the Act's coverage of state (as opposed to federal) employees. As the court of appeals recognized (Pet. App. A5-A6), the employee's connection to federally funded activities must be more than "merely a casual or accidental occurrence" of employment. *In re Brown*, 3 Political Action Rep. 273, 300 (Civil Serv. Comm'n 1974); see also 5 U.S.C. 1501(4)(A) (excepting from coverage any state employee who "exercises no functions in connection with" the federally funded activity). But where a

"normal and foreseeable," rather than "casual or accidental," connection exists, the Act's prohibition on partisan political campaigns is absolute, applying as much to the file clerk in a federally funded project as to the state officer who manages the project and oversees the disbursement of its funds.*

In this Court, petitioner does not contest the court of appeals' conclusion (Pet. App. A8-A9) that her functions with respect to federally funded activities were "normal and foreseeable incidents to her job as Executive Assistant to the Director of OID," a state agency with "administrative direction and control" (*id.* at A23) over two federally funded programs. Even if petitioner did not, by virtue of her position, exercise "discretionary authority" over those programs (*id.* at A40), her duties "in connection with" them (5 U.S.C. 1501(4)) were more than "merely a casual or accidental" incident of her employment. *In re Brown*, 3 Political Action Rep. at 300; see Pet. App. A5, A8-A9. The court of appeals therefore correctly held (*id.* at A9) that the evidence in this case was sufficient to support the MSPB's determination that petitioner was subject to the restrictions of the Act. Petitioner

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* In contrast, the federal criminal prohibition against the use of official authority to interfere with or affect campaigns for the Presidency or for certain other federal offices, 18 U.S.C. 595, applies only to federal or state officials "employed in any *administrative position* * * * in connection with" any federally financed activity (emphasis added). The legislative history confirms the distinction, treating the two provisions separately and describing the broader provision at issue here as applying to "any officer or employee of any State or local agency, who exercises *any function* in connection with" a federally financed activity. S. Rep. No. 1236, 76th Cong., 3d Sess. 3 (1940) (emphasis added).

identifies no decision of this Court or of any court of appeals that suggests a different legal standard or result.

2. Petitioner contends (Pet. 8-11) that application of the Hatch Act's partisan political campaign restrictions to her violates her rights under the First or Tenth Amendments or the equal protection component of the Fifth Amendment's Due Process Clause.

As the court of appeals observed (Pet. App. A9 n.7), this Court has repeatedly found that the Hatch Act's general prophylactic limitations on partisan political activity by federal employees do not violate the First Amendment. *United Public Workers* v. *Mitchell*, 330 U.S. at 100-101; *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 554-556 (1973); see also *Broadrick* v. *Oklahoma*, 413 U.S. 601, 606-608, 616-618 (1973) (sustaining similar state law restrictions on state employees). The Court has made clear that the permissible legislative motivations for limiting the political activity of public employees extend beyond ensuring impartial decision-making by those exercising supervisory or discretionary authority. They include ensuring that government employees will not be used to build a political "machine," and that their employment and advancement will not be based on their political activity. *Mitchell*, 330 U.S. at 101; *Letter Carriers*, 413 U.S. at 564-567; see also *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1015 (1995).

This Court has also approved the extension of the Hatch Act's restrictions to state officials employed in connection with federally funded programs. *Oklahoma* v. *United States Civil Serv. Comm'n*, 330

U.S. 127, 142-143 (1947). Petitioner suggests no persuasive reason for this Court to revisit that issue, or to require case-by-case balancing of each employee's interest in political participation against the governmental interests supporting the Hatch Act's limitations. See *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705-2706 (1993) ("validity of the regulation [under the First Amendment] depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case") (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989)); compare *Letter Carriers*, 413 U.S. at 564-567 (sustaining Hatch Act's content-neutral and non-discriminatory prohibi-tions) with, *e.g.*, *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 71-79 (1990), and *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968) (generally prohibiting adverse government employment actions based on an employee's views or political affiliations). If the federal government may restrict the partisan political activities of its own employees, it may also restrict such activities by state government employees involved with the administration and disbursement of federal funds. See *Oklahoma*, 330 U.S. at 143; cf. *Rust* v. *Sullivan*, 500 U.S. 173, 193-194 (1991).

Petitioner's allusion to the Tenth Amendment (Pet. 10) is equally unavailing. This Court has previously upheld the limitations at issue here against a State's Tenth Amendment challenge. In *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. at 143, the Court made clear that, "[w]hile the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it

does have power to fix the terms upon which its money allotments to states shall be disbursed." See also *id.* at 144 ("The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual."); *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987). Nothing in *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), which involved the limits of Congress's power under the Commerce Clause, suggests any different result in this case.

Finally, petitioner argues (Pet. 10-11) that asserted differences in the sanctions available to the MSPB against state and federal employees who violate the prohibition against partisan campaigning are unconstitutionally irrational. Petitioner did not make any such argument below, and neither the MSPB nor the court of appeals considered or passed upon it. The argument has therefore been waived. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987); *Delta Air Lines* v. *August*, 450 U.S. 346, 362 (1981); see also *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). Petitioner has given no reason for ~~their~~ failure to raise this claim at an earlier stage of this litigation, and she has identified no exceptional circumstances warranting this Court's review of a question not raised or decided below (or, so far as we are aware, in any other court). Compare *Youakim* v. *Miller*, 425 U.S. 231, 234-236 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1995